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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 943

EDWARD LAMB,
Petitioner,

vs.

PAT SUTTON and WSM, INC.,
Respondents.

EDWARD LAMB,
Petitioner,

vs.

PAT SUTTON and WLAC, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

To the Honorable Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit[1] entered on February 19, 1960, in case

[1] The United States Court of Appeals for the Sixth Circuit will be referred to herein either as the "Court of Appeals" or "Sixth Circuit".

No. 13,950, styled Edward Lamb, Appellant, vs. Pat Sutton and WLAC, Inc., Appellees, and Edward Lamb, Appellant, vs. Pat Sutton and WSM, Inc., Appellees, wherein said Court affirmed the judgment of the United States District Court for the Middle District of Tennessee.[2]

OPINIONS BELOW.

The opinion of the district court and the opinion of the Sixth Circuit appears in the Appendix hereto at page 33, in the certified record, and the opinion of the Sixth Circuit is reported in 274 F. 2d 705.

JURISDICTION.

The Sixth Circuit's judgment which affirmed the trial court's judgment, as aforesaid, was entered on February 19, 1960 (A. 45).[3]

This Court's jurisdiction is invoked under Title 28, U. S. C. A., Sections 1254 (1) and 2101 (c).

QUESTIONS PRESENTED.

1. Does Section 315 of the Federal Communications Act of 1934, Title 47, U. S. C. A., Sec. 315, "*propiro vigore*" (as held by the district court and Sixth Circuit) provide immunity to a defendant licensee of a radio and television station in a libel and slander action against said licensee who does not plead and prove that there were two or more legally qualified candidates (in accordance with the election laws of the State involved) for the same public office;

---

[2] The United States District Court for the Middle District of Tennessee will be referred to herein either as the "district court" or "trial court".

[3] The abbreviation "A" refers to the Appendix to this Petition.

and that the licensee had previously permitted one legally qualified candidate to use a broadcasting station and had been compelled to grant another legally qualified candidate equal opportunities in the use of said station?

2. Should a district court be allowed, by using Rule 15 (b), Rules of Civil Procedure; in a libel and slander action tried by a jury against the licensee of a radio and television station to set aside a jury verdict under Rule 50 (b) on the ground that the parties have an immunity under Section 315, propiro vigore, when the question of fact, as to whether or not the candidates involved were legally qualified candidates, has not been pleaded nor proven; or in any manner submitted to the jury to consider and when the jury has been specifically instructed by the district court that Section 315 was not applicable to the case except on the issue of malice of the defendant licensee, and thereby deprive the plaintiff of his right of trial by jury?

3. Does Section 315 require that when the licensee of a radio and a television station sells one political candidate two thirty minute spots on its television stations, and none on its radio station, that it must then sell any opposing candidate all the time which he may demand, or is the equal opportunity requirement of Section 315 met by granting the same time and facilities to the opponent as was granted to the initial candidate?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Constitutional provisions involved is Amendment VII:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried

by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

The Statutory provisions involved are Section 315 of the Communications Act of 1934, Title 47, U. S. C. A., Section 315, prior to being amended September 14, 1959, which is as follows:

"(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. . . .

"(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

"(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section."

And, Title 28, U. S. C. A., Section 1652, which is as follows:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply."

STATEMENT OF THE CASE.

Petitioner, Edward Lamb, brought an action against respondent, WSM, Inc., The National Life and Accident Insurance Company and Pat Sutton (App. 3a);[4] and also brought a separate action against respondent, WLAC, Inc., the Life and Casualty Insurance Company and Pat Sutton (App. 12a).

Petitioner brought these actions for damages against the respondents and the other defendants for the publication of slanderous and libelous remarks concerning the petitioner and some of his businesses (App. 3a-11a, 12a-20a).

The defamatory statements were made by the defendant, Pat Sutton, during the course of a so-called "talkathon" which continued for 26½ hours. Respondent, WSM, leased its facilities to Houck & Company, Miami, Florida, Mr. Robert Venn and the defendant Sutton for the talkathon, which lease included, among other things, one entire studio, known as "Studio C" in the home office of The National Life and Accident Insurance Company in Nashville, Tennessee, from 7:30 o'clock P. M. on July 12, 1954, until 10:00 o'clock P. M. on July 13, 1954, at which time WSM, Inc., furnished the necessary radio microphones, television cameras and all other necessary technical facilities and the use of technicians to broadcast over the radio of WSM and telecast over the television station of WSM for the talkathon program. As a part of the talkathon program the public was invited to avail themselves of the auditorium in Studio C and telephone service was made available and the general public was requested and encouraged to call in and ask questions of the defendant Sutton, at which time Sutton

[4] The abbreviation "App." refers to the appendices filed by the parties in the Sixth Circuit Court. The letter "a" following the page number cited indicates that the appendix filed in behalf of petitioner is referred to and the letter "b" following the page number cited indicates that the appendix filed in behalf of respondent is referred to.

answered or proposed to answer the questions for the studio audience, the radio listeners and the television viewers. It was admitted that the slanderous and libelous uttertances were broadcast over the radio stations of respondents and also the television station of respondent WSM (App. 52-62, 38a-39a, 104a-105a, 148a).

Both respondents, in their answers, made the affirmative defense, among others, by a plea of confession and avoidance that they did broadcast the alleged defamation, but they sold to their co-defendant, Pat Sutton, certain time, and that he was an announced candidate for the United States Senate, and before entering into said contract it had sold time and made available its facilities to "United States Senator Estes Kefauver, one of his principal opponents," and were therefore, because of the regulation of the FCC and laws of Congress, obligated to sell time to Sutton (App. 22a, 26a-29a). However, neither of the respondents in their answers made any insistence that Pat Sutton or Senator Estes Kefauver were "legally qualified candidates" at the time of making their contracts or making their facilities available to them, **as respondents were required to do if they were relying** upon Section 315 of the Communications Act of 1934 (Title 47, Sec. 315, U. S. C. A.), **as a bar to the suit.** Respondents did not mention or intimate in their answers that either Pat Sutton or Senator Estes Kefauver were at any time "legally qualified candidates," or did they intimate that they were going to rely upon the fact that they were "legally qualified candidates" at any of the particular times involved.

Thereafter the District Court, pursuant to Rule 16, Rules of Civil Procedure, ordered a pre rial conference and an order pursuant to the conference, a on being signed by all of the attorneys of record and the District Court was filed. It was "agreed by counsel and ordered by the Court," among other things, **that the issues of fact to be submitted**

to the jury which were enumerated in the order were binding on the parties at the trial "unless modified by an order of Court to prevent manifest injustice" (App. 32a-40a).

Respondents, as shown by the pretrial order, did not contend at the pretrial conference, nor make any request to enumerate as an issue of fact in the pretrial conference order that Pat Sutton was a "legally qualified candidate" at the time they rented their facilities to Pat Sutton nor did they, according to the pretrial order, contend at the pretrial conference, or make any request to enumerate as an issue of fact in the pretrial conference order that Senator Estes Kefauver was a "legally qualified candidate" at the time that respondents contended they sold Senator Kefauver time (App. 32a-40a). Both respondents were content to rely upon the affirmative defense of admitting the publication and claiming they had sold Sutton time in good faith by stating that they "sold time to the defendant, Pat Sutton, a candidate for political office, against the incumbent senator to whom it (respondents) had sold political time" (App. 34a-35a). Respondents, according to the pretrial order, did not insist at the pretrial conference that any of their defenses were being relied upon as a bar to the suits, or that they were immune from suit because of any defenses which they had, but two, namely, (1) Sutton's defense of truth if he could prove it, and (2) respondent's defense of non-negligence (App. 34a-35a).

Prior to the trial of these cases, petitioner, pursuant to the pre-trial conference order, submitted a trial brief (App. 90a, 159a) at which time petitioner objected to the defense of good faith and called attention to the respondents and the district court that Section 315 of the Communications Act was not applicable as a defense in these cases as pleaded because **these provisions of the Act were applicable when, and only when, the licensee was relying upon the defense** that the candidates involved were "legally quali-

fied candidates'' (App. 159a). Notwithstanding this timely objection on the part of petitioner the respondents still made no effort to amend the pre-trial order.

Upon the commencement of the trial of the cases the respondents stated to the district court and jury their defenses, and notwithstanding the respondents reasserting their **affirmative defenses of good faith** in that they were required to sell Sutton time because of Section 315 of the Act, the defense of truth in the event Sutton proved it, and non-negligence, etc., **they never did allege or state to the Court or jury** that the defendant Pat Sutton was a ''legally qualified candidate'' at the time they made their facilities available to him, and respondents never did state that their facilities had been previously used by any other ''legally qualified candidate'' at the time they made their facilities available to him, and they never did state that their facilities had been previously used by any other ''legally qualified candidate'' under the laws of the State of Tennessee. **Nor did they contend at this time that they were relying upon Section 315 of the Act, as a bar to the suits** (App. 90a-97a).

Upon respondents stating their defenses to the Court and jury, counsel for petitioner once more insisted that the defense of the respondents concerning Section 315 of the Act was not applicable to these cases, for the reason, ''the Act is only applicable to legally qualified candidates for public office'' (App. 98a). Notwithstanding this objection, still the respondents made no effort to amend the pre-trial order and gave no indication that they were relying upon Section 315 of the Act as making them immune from suit, or that they were relying upon the theory that Pat Sutton and Senator Estes Kefauver were ''legally qualified candidates.''

The cases were tried jointly over the objection of respondents (App. 76a). The cases were tried before a jury

at the request of petitioner (App. 11a, 20a). At the conclusion of the proof, respondents made motions for directed verdicts as follows:

> "Mr. Hunt: May it please the Court, the defendant WSM, Incorporated, moves for a directed verdict on the ground that by reason of Section 315, the Federal Communications Act of 1934, it has a privilege or immunity from suit for defamation based upon material broadcast by a legally qualified candidate for public office who was granted time by the licensee after his opponent had been granted time" (App. 57a).
>
> "Mr. Trabue: May it please the Court, I would like for the record to show that at the conclusion of all of the evidence comes the defendant, WLAC, Incorporated, and moves for directed verdict in its favor on the same grounds as those urged by WSM. I do not care to argue or urge the motion at this time" (App. 57a).

This is the first indication in the record that respondents contended that they were privileged from suit because they were obligated to sell time to their co-defendant, Pat Sutton, a "legally qualified candidate" for public office. Even at this late hour respondents made no contention or indication that they intended to rely upon the fact that Senator Kefauver was a "legally qualified candidate" at the time they claimed they sold him time.

After the motions for directed verdicts were argued, the district court agreed with the petitioner that Section 315 of the Act was not applicable to the cases on trial and held that the motions for directed verdicts were not well taken and the same should be overruled (App. 79a, 82a).

The district court instructed the jury that Section 315 of the Communications Act was not applicable in the case as a defense as a bar to the suit but did charge in favor

of respondents' theory that the Act was applicable in determining respondents' affirmative defense of good faith (R. 48-49).

In Civil Action No. 1925, the jury was directed to return a verdict in favor of the National Life & Accident Insurance Company, which it did, and the jury returned a verdict in the amount of $15,000 as damages in favor of petitioner and against respondent, WSM, Inc., and its co-defendant, Pat Sutton (App. 78a-80a).

In the case bearing No. 1936, the jury was directed to return a verdict in favor of the Life and Casualty Insurance Company, which it did, and the jury returned a verdict in the amount of $10,000 as damages in favor of petitioner and against respondent, WLAC, Inc., and its co-defendant, Pat Sutton (App. 81a-83a).

Thereafter, the defendant, Pat Sutton, in both cases made motions for new trials, which were overruled by the Court (App. 84a-86a) and he did not appeal.

Respondents made motions pursuant to Rule 50 (b) to have the verdict of the jury and the judgment of the Court entered thereon set aside and for judgments to be entered in accordance with their motions for directed verdicts which had been made at the conclusion of all of the evidence and these motions were granted (App. 61a-75a, 84a-87a).

Thereafter the cases were consolidated in order that one record could serve for both cases in the event of an appeal (App. 76a).

At the time of the so-called talkathon, petitioner and his immediate family were the owners of several large industries, including the Record Publishing Company which publishes a daily and Sunday newspaper at Erie, Pennsylvania. Petitioner also was the licensee of several large radio and television stations which stations were in com-

petition with the respondents, prior to, and at the time of the talkathon (App. 120a-123a, 125a).

At the time of the talkathon, respondent, WSM, Inc., operated a radio station in Nashville, Tennessee, and also operated a television station in Nashville, Tennessee, which was a separate and distinct operation from the radio station operation (App. 99a-100a, 146a). Respondent, WLAC, Inc., operated a radio station only in Nashville, Tennessee, at the time of the talkathon (App. 110a).

The entire 26½ hours of the "talkathon" program originated at the leased facilities of WSM and portions of it were broadcast over WSM's radio station, and portions of the program were broadcast over its television station, as well as other radio stations in Nashville, Tennessee, including the station of respondent, WLAC.

Respondents admitted the publication of the many slanderous and libelous statements made by Pat Sutton concerning the petitioner and his businesses including the statements that because of petitioner's communistic activities the Federal Communications Commission had taken all of his radio and television stations away from him. Not only did the proof establish that these statements were false, and known by the officials of respondents to have been false when uttered (App. 130a, 132a, 106a-107a) no evidence was offered to establish the revocation of any license of petitioner.

WSM, Inc., did not merely sell some time to Pat Sutton as stated by it in the pre-trial conference (App. 32a) but on the contrary it actually participated in the talkathon. WSM does not own any of its equipment but leases it from the National Life and Accident Insurance Company (App. 100a-101a). WSM subleased its facilities for the "talkathon" to the Houck & Company, Miami, Florida, Mr. Robert Venn and Pat Sutton (App. 102a-103a). In

the lease for the "talkathon" WSM leased an entire studio (Studio C) in the National Life Building and rented all its radio microphones, television cameras, and technical facilities in the studios which were operated by WSM, Inc.'s technicians (App. 103a). The technicians were used throughout the entire 26½ hours (App. 104a). Also, National Life furnished WSM, Inc., elevator service, and this service was by WSM, Inc., "sub-rented to Mr. Sutton and Mr. Venn or the Houck Company" (App. 105a).

WSM, Inc., admitted it did not ever have a political program of this nature before, and prior to its lease to Sutton, Venn and Houck Co., admitted that WSM had never leased its facilities or its studios to anyone else (App. 105a).

Respondent WLAC carried the entire 26½ hours of the talkathon over its radio station but at the time the talkathon went on the air its television station was not on the air (App. 109a-110a) and admitted that **WLAC had never broadcast a political program of this nature before** (App. 111a). The broadcast came to WLAC, Inc., over the American Telephone and Telegraph lines or the Southern Bell Telephone Company lines (App. 38a-39a; 97a; 103a-104a).

No evidence was offered to prove that Senator Estes Kefauver was a legally qualified candidate at any time. Evidence was introduced concerning the defendant Pat Sutton's qualification as a candidate and **according to the testimony of Pat Sutton he established that he was not, and could not have been a "legally qualified candidate"** according to the laws of the State of Tennessee (App. 132a-133a; 154a-155a; 159a).

Respondent WSM claimed that it had afforded some previous time to Senator Estes Kefauver (App. 138a) before renting its facilities for the talkathon but admitted

that Senator Kefauver had never appeared in person but WSM had sold some time for the use of a Kefauver film and sold some time for election night on television **and admitted that WSM was not obl ,ated to sell one minute of time to Sutton on the radio facilities of WSM because it had not sold any time on its radio to Senator Kefauver or had he ever appeared on its radio** (App. 138a-139a; 144a-146a). At the same time respondent, WSM, admitted as its reason for selling time to Sutton was that "A broadcaster feels that it is customary to sell time to political candidates" (App. 146a).

Both respondents were notified prior to the talkathon program that Pat Sutton would likely defame persons on the "talkathon" program because this was the pattern he had used on his previous talkathon programs (Exhibits Nos. 1 and 13). Whereupon, the respondents made Pat Sutton give to them an indemnity agreement whereby he indemnified respondents "against any liability arising because of judgment rendered against you in any suit based on defamatory statements made by me in the course of this program" (App. 135a, 151a), and also required the Houck & Company to indemnify respondents which provided that Houck and Company would hold respondents harmless against all liability for libel and slander (App. 153a).

Respondents admitted they had never previously requested any indemnity agreement from any other person appearing on their stations (App. 135a, 152a).

REASONS FOR GRANTING THE WRIT.

The reasons for granting the writ, which involve important questions to the government, its agencies and the public in general and not limited to the interest of the litigants and which should be settled and determined by this Honorable Court are as follows:

I.

The decision of the Sixth Circuit in this case is in direct conflict with the decision of the Ninth Circuit as reported in Weiss v. Los Angeles Broadcasting Company, Inc., et al., 163 F. 2d 313, 315, Cert. Denied, 33 U. S. 876, 92 L. Ed. 1152, 68 S. Ct. 895. In the Weiss case the Court held the provisions of Section 315 of the Federal Communications Act of 1934 are applicable as a defense, when, and only when, there are two or more legally qualified candidates for public office and one of them has been afforded time by the station to further his candidacy. The Ninth Circuit Court of Appeals made it clear that unless there were more than one legally qualified candidate Section 315 would not be applicable. The Sixth Circuit held that the question of whether the parties involved were legally qualified candidates is a technical question which does not have to be pleaded by the defendant and may be raised by claiming immunity provided under the laws of the United States.

Also the district court in its opinion which was approved by the Sixth Circuit stated as follows:

> "It is further insisted that the testimony shows that the talkathon agreement was not entered into with Sutton as a result of Section 315 but because it was station policy to grant time to any candidate for public office. The argument proceeds on the false premise that Section 315 applies only when it is specifically invoked in some way either by a candidate requesting time or by the station involved. It is altogether clear as pointed out that the Federal Communications Act occupies and regulates the field of interstate radio and television communications. Equally clear is the proposition that Section 315 occupies the field of political broadcasts made by candidates for public office and that it was intended to apply and govern notwithstanding the wishes of the parties af-

fected. The words 'under the provisions of this section' in the censorship clause are merely words of description and reference and not of limitation. The statute applies proprio vigore" (A. 44).

This is clearly in conflict with the decision in the Weiss case and the district court and the Sixth Circuit are saying by such reasoning, that any time a political candidate makes a speech over a television or radio station, Section 315 comes into play. It was held in the Weiss case that Section 315 applies when, and only when, there are two or more legally qualified candidates for the same public office and the licensee has permitted one of the legally qualified candidates for the office involved to use a broadcasting station and another legally qualified candidate for that office seeks equal opportunities in the use of such station.

Although this question was not before this Honorable Court in the case of Farmer's Educational Union v. WDAY, 360 U. S. 525, 3 L. Ed. 2d 1407, 79 S. Ct. 1302 because the parties had stipulated therein that the candidate involved was a legally qualified candidate, this Honorable Court clearly indicated that the immunity provided by the statute was applicable only where a legally qualified candidate was involved.

II.

The district court and the Sixth Circuit used Rules 15 (b) and 50 (b), Rules of Civil Procedure, in such a manner as to make the rules instruments to deprive litigants in district courts of their constitutional right of trial by jury.

III.

The holding of the Sixth Circuit is also in conflict with the decision of the Ninth Circuit as reported in the case of Walker v. West Coast Fast Freight, Inc., 9 Cir., 233

F. 2d 939, and the decision of the Second Circuit as reported in the case of Fernandez v. United Fruit Co., 2 Cir., 200 F. 2d 414, Cert. denied 345 U. S. 935, 97 L. ed. 1363, 735 S. Ct. 797, in which cases it was held that when a pre-trial order is filed pursuant to Rule 16, Rules of Civil Procedure, the parties and the Courts are limited to the issues enumerated in the pre-trial order.

IV.

The district court and the Sixth Circuit refused to follow the Tennessee law as it was required to do under the case of Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487, and the recent case of Dick v. New York Life Ins. Co., 359 U. S. 437, 3 L. ed. 2d 935, 79 S. Ct. 921, in two instances:

(1) The district court and the Sixth Circuit refused to hold that the law of Tennessee in respect to presumptions and burden of proof was binding on the district court where federal jurisdiction rested on diversity of citizenship.

(2) The district court and the Sixth Circuit refused to hold that the law of Tennessee was the proper standard to apply to test the sufficiency of the evidence to support a jury verdict which had been rendered where federal jurisdiction rested on diversity of citizenship.

It is true there now exists a conflict in the decisions of the several circuit courts on this last question, as demonstrated by the following cases. Gorham v. Mutual Ben. Health & Accident Ass'n, 114 F. 2d 97; Nichols v. Skelly Oil Co., 175 F. 2d 113; Davis Frozen Foods v. Norfolk Southern Ry. Co., 204 F. 2d 839; Continental Can Company v. Horton, 250 F. 2d 637.

ARGUMENT.

POINT NUMBER I.

In the case of Weiss v. Los Angeles Broadcasting Co., 163 F. 2d 313, 315, Cert. denied 333 U. S. 876, 92 L. Ed. 1152, 68 S. Ct. 895, the Court held as follows:

> "These provisions are applicable when, and only when, there are two or more legally qualified candidates for the same public office, and a licensee has permitted one such candidate for that office to use a broadcasting station, and another such candidate for that office seeks equal opportunities in the use of such station. It appeared from the complaint that during the period from February 20, 1945 to April 3, 1945, appellant was a legally qualified candidate for the office of Mayor of the City of Los Angeles, but it did not appear that there was any other legally qualified candidate for that office. It appeared that Bowron, Clinton, McDonald and Entenza were candidates for that office, but it did not appear that any of them was a legally qualified candidate."

It has been held that the protection of the statute cannot even be extended to defamation of **an authorized** representative of a legally qualified candidate. Felix v. Westinghouse Radio Stations, 186 F. 2d 1.

The rules of the Federal Communications Commission which were relied upon by respondents below define "legally qualified candidates" to be as follows:

> "Broadcasts by candidates for public office—(a) Definitions. A 'legally qualified candidate' means any person who has publicly announced that he is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special, or general election, municipal, county, state

or national, and who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate, so that he may be voted for by the electorate directly or by means of delegates or electors, and who . . .". 47 Code of Federal Regulations, Sections 3.120a, 3.290, 3.590.

The pertinent provision of the Tennessee Statutes stating the qualifications of a candidate and the manner in which a candidate could have become legally qualified in the election for the democratic nomination for the office of United States Senator from Tennessee held August 5, 1954, are stated in separate appendix of petitioner (App. 154a-157a), but for ready reference the pertinent statutes are quoted in the appendix of this petition (A. 49).

When the district court and Sixth Circuit held that **it was not necessary** for respondents to have granted Sutton time on their stations as a result of Section 315 of the Act a principle was established which is contrary to the expressed intent of Congress in said Act; contrary to the holding of the Ninth Circuit in the Weiss case; and contrary to the holding of this Court in the case of Farmers Educational and Coop. Union of America v. WDAY, Inc., 360 U. S. 525, 3 L. Ed. 2d 1407, 79 S. Ct. 1302.

The Act plainly states that the immunity is only applicable to "legally qualified candidates".

The district court held in this respect that the "statute applies proprio vigore". On the contrary the Ninth Circuit held that the statute was not so applicable in that the statute was not applicable automatically, or by its own force because the statutory "provisions are applicable when, and only when, there are two or more legally qualified candidates for the same public office, and a licensee has permitted one such candidate for that office to use a broadcasting station, and another such candidate for that office seeks equal opportunities in the use of

such station. It appeared from the complaint that during the period from February 20, 1945, to April 3, 1945, appellant was a legally qualified candidate for the office of Mayor of the City of Los Angeles, but it did not appear that there was any other legally qualified candidate for that office. It appeared that Bowron, Clinton, McDonald and Entenza were candidates for that office, but it did not appear that any of them was a legally qualified candidate."

The district court was completely convinced that the appellees did not prove, and no other party to the suit proved that either Sutton or any other opponent of his was legally qualified. In the argument of the motion for a directed verdict, Mr. Pope said:

> "This is a statute that they are relying upon as their defense, and, therefore, they have got to affirmatively comply with the requirements of that statute before they can offer it as a defense."

The Court:

> "There is no direct proof of that. You are right about that."

Mr. Pope:

> "There is direct proof that he was not legally qualified."

The Court again:

> "If you interpret Sutton's—he might not have known actually" (App. 159a).

Now, the District Court fully realizing that the appellees had not brought themselves within the terms of Section 315 by proof, said:

> "There is no direct evidence that all of the required steps were taken to qualify either candidate in the Primary" (App. 73a).

The district court then resorted to what it called a legal presumption that public officials perform their official duties.

However, this holding and observation of the district court was erroneous because in Tennessee the rule has been adopted that "a presumption" is not evidence of a fact but is merely a rule of law which requires a certain conclusion in the absence of contrary evidence. Frank, v. Wright, 140 Tenn. 535; Schindler v. So. Coach Lines, Inc., 188 Tenn. 169.

In the WDAY case this question could not be resolved because the parties thereto had stipulated therein that the candidate Townley was a legally qualified candidate and Townley was allowed time by the licensee because "it felt compelled to by the requirements of Section 315" of the statute.

POINT NUMBER II.

Notwithstanding Rule 38, Rules of Civil Procedure, expressly providing that the "right of trial by jury as declared in the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate" litigants in district courts may now be deprived of this right by the use of Rule 15 (b) and Rule 50 (b), Rules of Civil Procedure unless the opinions rendered below in these cases are clarified and corrected.

Petitioner duly and properly demanded a trial by jury to determine all issues of fact (App. 11a; 20a).

Prior to the trial, by stipulation of counsel, and by order of the district court, the issues of fact were enumerated in a pre-trial conference order pursuant to Rule 16, Rules of Civil Procedure (App. 32a-40a).

No issues of fact were made that Senator Kefauver was a legally qualified candidate pursuant to the election laws

of Tennessee at the time he allegedly procured time from respondents or used the facilities of respondents, or that Mr. Sutton was a legally qualified candidate pursuant to the election laws of Tennessee and was such a candidate when he sought equal opportunities from respondents, or that Mr. Sutton was a legally qualified candidate pursuant to the election laws of Tennessee and was such a candidate when he sought equal opportunities from respondent and was such a legally qualified candidate when he used such facilities.

As heretofore demonstrated, the respondents prior to and during the trial were not relying upon Section 315 of the Act as a bar to the suit but was relying upon its provisions as a matter of good faith in mitigation of damages, supra, pp. 6-8. It was only after the proof was all in that respondents took the position that they were immune from suit because of Section 315 of the Act because the candidates involved were legally qualified candidates; and even at this late period they did not seek to have the case reopened or seek to have the district court amend its pre-trial order (App. 57a).

Thereafter, the district court charged the jury that the Section 315 of the Act was not applicable to the cases at bar and that the only consideration the jury could give to the Act was whether or not the respondents were guilty of malice.

The jury found for petitioner in both cases. Thereafter, respondents filed a motion asking the district court to set aside the verdict of the jury in both cases and grant their original motion for a directed verdict pursuant to Rule 50 (b).

Notwithstanding the motion requiring the district court to determine issues not pleaded; issues which had not been incorporated in the pre-trial order; issues upon which no evidence had been offered; issues where the only evidence

offered was contrary to the district court's holding; and issues of fact which should have been submitted to a jury demanded by petitioner, the district court sustained respondents' motion. This practice was approved by the Sixth Circuit by holding that "We think that the issue of whether Sutton and Senator Kefauver were legally qualified candidates for public office was clearly injected into the case and so treated by the Court. It is so treated on this appeal. Rule 15 (b), Rules of Civil Procedure".

This holding was made in the face of this record which shows that no such issue was made, nor considered by the district court as having been made until the motion for directed verdict was made by respondents. Furthermore, counsel for respondents and counsel for petitioner contended in oral argument before the Sixth Circuit that no such issue was made before the district court, and counsel for respondents had asserted in their brief in the Sixth Circuit that "**Accordingly, no issue of fact was made at the pre-trial conference as to whether Pat Sutton or Senator Kefauver was a 'legally qualified candidate'.** Therefore, any issue as to the candidacy of Sutton or Kefauver was eliminated from the case by the pleadings and by subsequent pre-trial conference proceedings" (Brief for Appellees, in Sixth Circuit, p. 14).

If a district court is so allowed to use Rule 15 (b) and 50 (b) of the Rules of Civil Procedure to deprive a litigant of his trial by jury, then the Seventh Amendment of our Constitution has become a farce and likewise Rule 28, Rules of Civil Procedure, has become idle words.

It is admitted that the record in this case demonstrates that the granting or denial of this petition is of less importance to him than the general public and certainly this Honorable Court should permit this question to come before it because of the fundamental constitutional right involved and because of the importance of the question to

our federal judiciary, and the proper application of the Rules of Civil Procedure.

Although Counsel for petitioner have been unable to find where a federal court has passed upon this question, we were able to find where this Honorable Court, in the case of Berry v. United States, 312 U. S. 450, 85 L. Ed. 945, 947, 61 S. Ct. 637, held that Rule 50 (b) "has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law."

Notwithstanding the strong and forceful arguments for a system of jurisprudence other than the jury system including the argument that nisi prius judges are so much more qualified to pass upon factual matters than a jury of the litigant's peers, still our Constitution provides for a trial by jury.

POINT NUMBER III.

It was held in the case of Fernandez v. United Fruit Co., Second Circuit, 200 F. 2d 414, Cert. denied, 345 U. S. 935, 97 L. ed. 1363, that the parties and the Court will be limited to the issues enumerated in the pretrial order even though the pleadings in the case make an issue not enumerated in the pretrial order and the pretrial order stated that "none of the issues raised by the pleadings were abandoned." See also Walker v. West Coast Fast Freight, Inc., 9 Cir., 233 F 2d 939.

The holding of the district court and the Sixth Circuit in the cases at bar was in direct conflict with the aforesaid holdings of the Second and Ninth Circuits, because the issues of fact whether or not Senator Kefauver and Mr. Sutton were legally qualified candidates, and whether time was sold to Mr. Sutton because of Section 315 of the Act was not enumerated in the pretrial order.

Respondents had the opportunity to contend that Pat Sutton and Senator Kefauver were legally qualified candidates when they filed their answers, which they failed to do (App. 21a-31a); respondents could have taken such a position at the pretrial conference, which they failed to do (App. 32a-40a); at the commencement of the trial they could have made such a contention and could have asked for an amendment of the pretrial conference order when this deficiency in pleading was called to the attention of the respondents (App. 90a, 98a, 159a), and even after respondents made their motions for directed verdicts, at which time they claimed for the first time that Pat Sutton was a legally qualified candidate, respondents could have asked the district court to amend the pretrial order to make it an issue as to whether or not Pat Sutton and Senator Kefauver were legally qualified candidates in accordance with the laws of the State of Tennessee at the time respondents entered into purported agreements, and asked that the case be reopened in order that they could be permitted to introduce evidence on this issue, but this the respondents failed and refused to do.

POINT NUMBER IV.

Section 315 of the Communications Act provides that the licensee of a radio or television station "shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station . . .".

It is the position of counsel for petitioner that the term "such candidates" means legally qualified candidates and that the term "equal opportunities" includes listening time of equal value and duration under like or similar conditions as granted the first or original legally qualified candidate.

The rules of the Federal Communications Commission covering political broadcasts provide that the licensee "shall make no discrimination in charges, practices, regu-

lations, facilities or services rendered" to legally qualified candidates. 47 C. F. R., Sec. 3.657 (c) (2).

The phrase "afford equal opportunities to all other such candidates" of Section 315 of the Act has been before the F. C. C. many times for construction and "has been uniformly construed by the Commission to mean that the other candidate is entitled to listening time of equal value and duration under like conditions". In Re Application of Port Huron B/casting Co. (WHLS), Docket No. 6987, File No. B2-R-976; 4 Pike & Fischer Radio Regulation (R. R.) 1 (1948).

Respondent WSM claimed that it had afforded some previous time to Senator Kefauver (App. 138a) before renting it facilities for the talkathon but admitted that Senator Kefauver had never appeared in person but WSM had sold some time for the use of a Kefauver film and sold some time for election night on its television station and further admitted that **WSM was not obligated under Section 315 of the Act to sell one minute of time to Sutton on the radio facilities of WSM because it had not sold any time on its radio to Senator Kefauver or had he ever appeared on its radio station** (App. 138a-139a; 144a-146a). At the same time respondent, WSM, admitted as its reason for selling time to Sutton was that "A broadcaster feels that it is customary to sell time to political candidates" (App. 146a).

Later defendant Pat Sutton was allowed the use of respondent licensees' radio and television stations and equipment for a period of 26½ hours. The statute provides that no radio or television station is forced to rent their facilities to any candidate for political office, but once the station has made their facilities available to one **legally qualified candidate** the licensee must afford all opposing legally qualified candidates equal opportunities and time. The reasoning concerning the equal opportunity

portion of the Act has been described by a Committee in Congress when they made the following observation:

> "A careful examination of the legislative history of section 315 of the Communications Act and its predecessor, section 18 of the Radio Act of 1927, reveals clearly that the fundamental objective of that statute was to require any licensee who had allowed any legally qualified candidate to use his facilities to afford equal opportunity to all other candidates for that same office. Its basic purpose was to require equal treatment by broadcasters of all candidates for a particular public office **once** the broadcaster made a facility available to any one of the candidates. This was a sound principle and the committee reemphasizes its belief in that objective. The equal time provision of section 315 (a) was d gned to assure a legally qualified candidate that he will not be able to acquire unfair advantage over an opponent through favoritism of a station in selling or donating time or in scheduling political broadcast. If the number of radio and television stations were not limited by available frequencies, the committee would have no hesitation in removing completely the present provision regarding equal time and urge the right of each broadcaster to follow his own conscience in the presentation of candidates on the air. However, broadcast frequencies are limited and therefore, they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias."
>
> U. S. Code, Congressional and Administrative News, 1959, Vol. 2, 2570, 2571.

It is urged by petitioner that respondent, WSM was under no obligation to give defendant Sutton time on

its radio station as none had been used by Senator Kefauver.

It is further pointed out that if it were conceded that the candidates involved were legally qualified candidates and the respondents had properly invoked Section 315 as a defense, the provisions of Section 315 would have been met by respondent licensees if they had granted defendant Sutton the same time which they had granted his opponent Kefauver. Instead of attempting to do this, respondent WSM leased its station, facilities and various technicians for a period of time unprecedented in the history of the said station.

Instead of merely permitting the defendant Sutton to appear on its station, respondent, WSM, Inc., joined in the political campaign and leased an entire studio, facilities and various technicians for a period of 26½ hours to defendant Sutton for the purpose of staging a so-called talkathon. Prior to negotiations for the said lease the respondents were on notice from defendant Sutton's prior talkathon that he was prone to make libelous statements which were untrue and unfounded. One would think that when a radio and television station is aware of these facts that they would attempt after an investigation to determine that Mr. Sutton was a legally qualified candidate and to give him no more time than they were absolutely forced to give him in order to comply with Section 315. But on the contrary, respondents prior to signing this lease were content to require defendant Sutton to execute an indemnity bond which would relieve respondents from all liability in damages for any slander and libelous statements made during the said talkathon. It was admitted by the respondents that they never before in their history required a political candidate to file an indemnity bond. The inference to be drawn from this conduct is that they were reasonably sure that during this said talkathon de-

fendant Sutton was likely to make some libelous statement for which he and respondents would be sued.

The foregoing facts evinces such a complete disregard for the rights of innocent individuals, the community, the entire public and the broadcasting industry in general as prevent respondents from claiming immunity under Section 315 of the Act. If respondents, WSM, Inc., had refused to give candidate Sutton more than one hour on its television station it is clear that it would not have been guilty of a violation of Section 315. Section 315 has been rigidly construed by the Federal Communications Commission and recently after the Lar Daly ruling wherein the F. C. C. ruled that a broadcaster "cannot devote 1 minute to a legally qualified candiate participating in any program whatever the subject, be it atomic energy, the need for adequate defense, a road or bridge ribbon-cutting event, dedicating a post office, or opening a charity drive, without being compelled to make available a minute to every other legally qualified candidate to the same office". See U. S. Code, Congressional and Administrative News, 1959, Vol. 2, p. 2570.

POINT NUMBER V.

(1) The district court and the Sixth Circuit resorted to what they referred to as a legal presumption that public officials perform their official duties and that it could be presumed that the candidate Sutton therefore was a legally qualified candidate (App. 73).

This holding was erroneous and the district court and the Sixth Circuit should have followed the law of the State of Tennessee on this subject because the jurisdiction of these cases were based upon diversity of citizenship. Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487; Palmer v. Hoffman, 318 U. S. 109, 87 L. ed. 645, 63 S. Ct. 477, 144 A. L. R. 719; Dick v.

New York Life Ins. Co., 359 U. S. 437, 3 L. ed. 2d 935, 79 S. Ct. 921. It is well settled in Tennessee that "a presumption" is not evidence of a fact but merely a rule of law which requires a certain conclusion in the absence of contrary evidence. "Presumptions of fact" are deductions taken from particular facts or circumstances proved, and presumptions are raised to take the place of proof; "where the proofs are present, there is neither foundation or room for presumption." Frank v. Wright, 140 Tenn. 535, 547-548; Schindler v. So. Coach Lines, Inc., 188 Tenn. 169.

Therefore, when testimony was introduced that Mr. Sutton's petition "was filed with the Secretary of the State" the District Court had no right, while considering a motion filed pursuant to Rule 50 (b), to **presume** that the witness was mistaken in his testimony, and to **presume** that he must have had his petition presented to the proper officials, and to **presume** that the proper officials performed their duties.

If there could arise any legal presumption, under these circumstances, that a public official did his duty, it would be that no certificate was furnished to the County Primary Boards by the Chairman of the State Primary Board that Sutton was legally qualified. This is true because the statute absolutely prohibits the Chairman of the State Primary Board from furnishing such certificate to the County Primary Boards unless the qualifying petition is filed with him, and this record absolutely and without dispute, or conflict, proves that no such petition was filed with the Chairman or Secretary of the State Primary Board.

The statute giving immunity to broadcasting stations, under certain conditions, is not only an exception to the general law, but it is indeed a radical exception.

It is a well defined and accepted principle of law, recognized and applied by the Courts of the States and the

Federal Courts, that an exception to the general law is strictly construed and does not take a case out of the general law unless it falls fully within the terms of the exception. This is such a universally accepted principle of law that we deem it unnecessary to cite more than one case, viz.: Trice v. McGill, 158 Tenn. 394.

Now let's see if respondents brought themselves within the terms of the exception statute (Section 315) on which they now rely. If not, the general law applies and they would have no immunity. **Petitioner insists that they did not bring themselves within the terms of the exception.** Nowhere in the pleadings does either of the respondents use the words "legally qualified candidate"; and although it was called sharply to the attention of the nine able and widely experienced lawyers, even before the long trial started, that it was necessary to prove this essential fact (App. 159a), yet they made no effort to prove the mandatory requirement of the statute. In fact, nowhere and at no time were the words "legally qualified candidate" used by the respondents, or their attorneys, until all of the evidence was completed, at which time they used it in their motions to direct a verdict in their favor. Recognizing the materiality of the term, "legally qualified candidate", they did include it in their motion.

It was not incumbent upon the petitioner below to prove that Sutton was not a legally qualified candidate. On the contrary, the burden was upon the respondents to affirmatively prove that he was legally qualified as the statute mandatorily provides. This is the only way that the respondents could bring themselves within the terms of Section 315. The respondents set up an affirmative defense and, therefore, it was incumbent upon them to prove that defense.

The respondents never made the least effort to offer one syllable of proof that either Sutton or his opponent

were legally qualified candidates. Why didn't the Broadcasting Companies offer proof that Sutton and his opponent were legally qualified candidates? If Sutton had been qualified as the law of Tennessee provides, they could easily have proven it. The case was tried in the District Court at Nashville, very little over a stone's throw of the capitol of the State.

The district court resorted to an unsupported, unreasonable and impossible presumption, and ignored positive proof which prevented and destroyed the presumption, as a basis for granting the motion of respondents which they made pursuant to Rule 50 (b).

The jurisdiction of these cases were based upon diversity of citizenship, therefore the law governing the burden of proof of an affirmative defense is governed by the law of the State of Tennessee. Palmer v. Hoffman, 318 U. S. 109, 87 L. Ed. 645, 63 S. Ct. 477, 144 A. L. R. 719; Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487; Dick v. New York Life Ins. Co., 359 U. S. 437, 3 L. Ed. 2d 935, 79 S. Ct. 921.

The law in Tennessee is well settled that when the respondent relies upon the compliance with a statute as a bar to the suit, the respondent must prove, in order to succeed, "a strict compliance with its provisions". Murray v. Motor Truck Sales Corp., 160 Tenn. 140; Whitelaw Furniture Co. v. Boon, 102 Tenn. 719. Also in Tennessee when the defendant is relying upon the defense of privilege or immunity of suit without a statute being involved, the burden of proof is cast upon the respondent to establish all of the elements and facts constituting the privilege. Sofge v. Lowe, 131 Tenn. 626.

(2) The district court and the Sixth Circuit should have held that the jurisdiction of these cases being based upon diversity of citizenship, the law of Tennessee should be the proper standard to test the sufficiency of the evidence

to support the jury verdict rendered. Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487. If the district court had so applied the Tennessee law it would have been required to overrule respondents' motion and the verdict of the jury would have been approved. Smith et al. v. Sloan, 189 Tenn. 368, 376-377.

It is admitted there now exists a conflict in the holdings of the circuit courts on this question, as demonstrated by the following cases: Gorham v. Mutual Ben. Health & Accident Ass'n, 114 F. 2d 97; Nichols v. Skelly Oil Co., 175 F. 2d 113; Davis Frozen Foods v. Norfolk Southern Ry. Co., 204 F. 2d 839; Continental Can Company v. Horton, 250 F. 2d 637. And this Honorable Court has not decided the question. Dick v. New York Life Ins. Co., 359 U. S. 437, 3 L. Ed. 2d 935, 79 S. Ct. 921.

CONCLUSION.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION OF THE DISTRICT COURT.

In the District Court of the United States for the
Middle District of Tennessee
Nashville Division

Civil Action No. 1925

(Filed July 29, 1958)

Edward Lamb

vs.

Pat Sutton and WSM, Incorporated

Civil Action No. 1936

Edward Lamb

vs.

Pat Sutton and WLAC, Incorporated

Opinion.

The defendant Pat Sutton was a candidate for United States Senator in the primary election of the Democratic Party held in Tennessee in August, 1954, opposing incumbent Senator Estes Kefauver. In connection with his campaign the defendant Sutton conducted a so-called "talkathon" which was carried over the radio and television facilities of the defendants, WSM, Inc., and WLAC, Inc. The talkathon continued for an uninterrupted period of twenty-six and a half hours, beginning at 7:30 P. M. on July 12, 1954, and concluding at 10:00 P. M. on July 13, 1954. Prior to this time Senator Kefauver had used the facilities of the defendant stations for political broadcasts in connection with his campaign and had contracted for time subsequent to the talkathon. However, the time purchased by defendant Sutton was in excess of the time requested or used by Senator Kefauver.

The actions were instituted by the plaintiff to recover damages from the defendant Sutton and the defendant

broadcasting stations because of remarks made by Sutton during the course of the talkathon concerning the plaintiff which the plaintiff alleged to be libelous. In substance, the claim for damages was based upon the remarks of Sutton to the effect that the plaintiff was a known Communist and that his licenses to operate radio and television stations had been revoked by the Federal Communications Commission. The actions were tried to a jury and resulted in verdicts in favors of the plaintiff, in the amount of $15,000.00 against Sutton and WSM, and in the amount of $10,000.00 against Sutton and WLAC.

The defendant Sutton has filed a motion for a new trial upon the sole ground that the verdicts are excessive. In actions of defamation the wrong done to a plaintiff is peculiarly difficult to measure according to a money standard. And as pointed out in the early case of **Saunders v. Baxter**, 53 Tenn. 369, 384-385, the Court will not interfere unless the damages allowed by the jury are "unreasonable beyond measure". It is true that the jury verdict was limited to a finding that plaintiff was libeled by the remark that his licenses had been revoked. But considering the natural tendency of such a statement, if false, to do harm, its widespread dissemination over the facilities of the two broacasting stations, and all the circumstances as developed by the proof, it would not be possible for the Court to say that the damages allowed are unreasonable.

The plaintiff testified that the defendant's statement alone had damaged him both personally and in connection with his business enterprises, whereas in a previous District Court case, immediately prior to Sutton's statement, he had testified that the damage resulted from the Federal Communications Commission's letter setting a hearing on his application for renewal of licenses held by him. It is argued that these statements are totally inconsistent and, under the authority of **Johnston v. C., N. O. &**

T. P. Ry. Co., 146 Tenn. 135, 158, and other decisions of like import, cancel each other out and leave the record without evidence of special damage. However, there is ample evidence in the record, aside from the statements of the plaintiff as to the cause and extent of his damages, from which the jury could have concluded that he was in fact substantially damaged by the libelous remarks in question and upon which it could reasonably have predicated the allowance of the aggregate amount of $25,000.00. Consequently, the doctrine of **Johnston v. C., N. O. & T. P. Ry. Co.**, supra, is inapposite.

The defendants WSM and WLAC have moved the Court to set aside the verdicts in the actions and to enter judgment in their favor in accordance with their motions for directed verdicts made at the close of the evidence. The motions for directed verdicts are based upon the argument that under Section 315 of the Federal Communications Act of 1934, as amended, 47 U. S. C. A., Section 315, defendant stations have a "privilege or immunity from suit for defamation based upon material broadcast by a legally qualified candidate for public office who was granted time after his opponent had been granted time."

Section 315 provides:

> "(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: **Provided**, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate.
>
> "(b) The charges made for the use of any broadcasting station for any of the purposes set forth in

this section shall not exceed the charges made for comparable use of such station for other purposes.

"(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section."

Thus no express provision in the section grants immunity to a licensee for defamatory remarks made by a candidate for public office during a political broadcast. But it would appear that such immunity is necessarily implied. Analyzing the language employed it is seen that a licensee is not required to grant broadcasting time to any of the candidates for a particular public office. However, if it elects to permit any candidate for public office to use its facilities, it must afford equal opportunities to all other candidates for the same office. If it does so elect to allow the use of its facilities in a particular political campaign, it has "no power of censorship over the material broadcast under the provisions of this section." The denial of the right of censorship is complete, including any portions of the material deemed by the licensee to be defamatory. If the licensee, as the section clearly provides, is deprived of all right or power to censor or to delete any portions of the material to be broadcast by a political candidate, it logically follows that it was the intention of Congress to immunize the licensee from liability for defamation arising from remarks made by such candidate while using its facilities. It cannot fairly be supposed that Congress meant to leave licensees exposed to a continued liability for defamation and at the same time to deprive them of the power to avoid such liability.

This interpretation of Section 315 was adopted by the Federal Communications Commission in a well-reasoned opinion **In Re Application of Port Huron Broadcasting Co.** (1948), 4 R. R. 1, in which case the Commission was dealing with the attempted censorship by the broadcasting company of the speech of the first candidate in a political

race requesting the use of its facilities. In the course of its opinion the Commission stated:

". . . Accordingly, we are of the opinion that the prohibition of Section 315 against any censorship by licensees of political speeches by candidates for office is absolute, and no exception exists in the case of material which is either libelous or might tend to involve the station in an action for damages. In reaching this conclusion, however, we hold merely that the censorship prohibited under Section 315 of the Communications Act includes the refusal to broadcast a speech or part of a speech by a candidate for public office because of the allegedly libelous or slanderous content of the speech. Nothing in this opinion is intended to indicate that a licensee is necessarily without power to prevent the broadcast of statements or utterances in violation of the provisions of the Communications Act or any other federal law on broadcasts coming within the requirements of Section 315 of the Communications Act.

"The argument has been advanced that such an interpretation of the Act cannot be correct, because it would leave the licensee in the completely untenable position of being forbidden to censor political speeches containing libelous or other actionable material and, at the same time, subject to damages for any libelous or actionable material in such broadcasts. But this argument not only has no basis in the legislative history of the Section as explained above, but is based on an assumption of the licensee's liability for the remarks made by political candidates speaking under the section which we do not believe is tenable. For as we read the provisions of Section 315, the prohibition contained therein against censorship in connection with political broadcasts appears clearly to constitute an occupation of the field by federal authority, which, under the law, would relieve

> the licensee of responsibility for any libelous matter broadcast in the course of a speech coming within Section 315 irrespective of the provisions of state law."

The legislative history of Section 315, fully set forth elsewhere in the Port Huron opinion, lends support to the conclusions reached by the Commission as to the absolute character of the no censorship mandate of Section 315. Significant also is the fact that Congress has not, after the interpretation of Section 315 by the Commission in the Port Huron case, enacted statutes supplanting or modifying the section or its interpretation by the Commission. In 1948 a select committee of the House opened hearings and gave consideration to the Port Huron decision. Following the hearing the committee made no legislative recommendations with respect to Section 315, a strong indication that there is no general disagreement on the part of Congress with the construction adopted by the Federal Communications Commission. See **In Matter of WDSU Broadcasting Corp.** (1951), 7 R. R. 769.

In a recent decision the Supreme Court of North Dakota in **Farmer's Educational and Cooperative Union of America v. WDAY, Inc.**, 89 N. W. (2d) 102, decided April 3, 1958, has construed the censorship provision of Section 315 to grant immunity to a station for libelous material used by a candidate for public office. In that case the court stated:

> "There is no ambiguity in Section 315, supra. It provides in clear and specific language that where candidates for political office are permitted to use the facilities of a station such station 'shall have no power of censorship'. There are certain exceptions 'and narrowly limited classes of speech, the prevention of which have never been thought to raise any constitutional problem. Th se include the lewd and obscene, the profane, and libelous and the insulting

or "fighting" words—those which by their very utterance inflict injury or tend to incite to an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' **Beauharnais v. Illinois**, 343 U. S. 250, 96 L. Ed. 919, 72 S. Ct. 725.

"In the instant case the defendant WDAY was required by Section 315 to permit the broadcast of the Townley speech. Power to censor the speech was denied by the clear and specific language of Section 315. We cannot believe that it was the intent of Congress to compel a station to broadcast libelous statements and at the same time subject it to the risk of defending actions of damages."

* * * * * * * *

"When Congress enacted Section 315 it recognized the convenience and necessity of the general public and its right to information relative to political issues, the qualifications of candidates for public office, and their attitude on questions of grave importance affecting the general welfare of the state and nation."

* * * * * * * *

"The plaintiff contends that if said Section 315 is held to grant immunity to the defendant WDAY it would be unconstitutional and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. To this we cannot agree. Section 315 imposes a mandatory duty upon broadcasting stations to permit all candidates for the same office to use their facilities if they have permitted one candidate to use them. Since power of censorship of political broadcasts is prohibited it must follow as a corollary that the mandate prohibiting censor-

ship includes the privilege of immunity from liability for defamatory statements made by the speakers. In fact the maxim 'res ipsa loquitur' applies to the situation presented here. There is no provision in the Fifth and Fourteenth Amendments to the Constitution which prohibits Congress from either granting or denying a privilege. As we have pointed out elsewhere in the opinion, the manifest purpose of Congress in enacting Section 315 was to afford full opportunity to candidates for political office to give to the electorate and the public generally facts relative to their qualifications and fitness for the office to which they aspire."

A contrary ruling was made by the Supreme Court of Nebraska in **Sorensen v. Wood**, 123 Neb. 348, 82 A. L. R. 1098, in which the court construed Section 18 of the Radio Act of 1927, the forerunner of Section 315, and containing an identical censorship provision. The Nebraska Supreme Court rejected the theory of immunity, construing the censorship clause as preventing "the licensee from censoring the words as to their political and partisan" trend but not as giving the licensee any privilege to join and assist in the publication of a libel nor as granting any immunity from the consequences of such action. But the basis for such a distinction cannot be found in the language of Section 315 itself nor has any reference been made to the legislative history of the enactment to support it. It would appear to be in conflict with the clear purpose of Congress as expressed in Section 315 and as demonstrated by legislative history to deny to broadcasting stations any right to exercise control or censorship over the speeches of candidates for public office. It was evidently the belief of Congress that the denial of such right of censorship would contribute to the free and untrammeled discussion of public issues and would subserve the public interest. The ruling of the Nebraska Supreme Court would seriously impair the efficacy of the interdict against censorship and

would introduce a distinction based upon the so-called partisan trend of the words which would be practically impossible to apply with any fair degree of certainty. The Court is of the opinion that Congress under the Federal Communications Act of 1934, as amended, completely occupied and preempted the field of interstate communications in radio and television, and that from the censorship provision in Section 315 and other regulatory provisions of the Act, there results by necessary implication an immunity of a broadcaster from liability for defamatory material broadcast by a legally qualified candidate. **Cf. Sola Electric Co. v. Jefferson Electric Co.**, 317 U. S. 173; **O'Brien v. Western Union Telegraph Co.**, 113 F. 2d 539, CCA 1.

The plaintiff argues that even if Section 315 does grant to licensees immunity from defamatory statements in political broadcasts the section is inapplicable in the present case for a number of reasons. First, it is insisted that the defendants have failed to show that they were licensees at the time they entered into the broadcast agreements or at the time of the talkathon. Concededly no direct evidence was offered to show that the defendants WSM and WLAC held licenses from the Federal Communications Commission to operate radio and television stations at the time the agreements were entered into or at the time of the broadcast. Nevertheless the Court is of the opinion that this insistence of the plaintiff cannot prevail. The stations could not have been legally operated without licenses from the Federal Communications Commission. A presumption ordinarily prevails, in the absence of proof to the contrary, that the law has been complied with. In the present case there is evidence that the defendants maintained and operated in Nashville large radio and television stations, broadcasting their programs over a wide territory. From the testimony adduced it is also a necessary conclusion that the stations had been operating prior to the talkathon in

question for a considerable period of time. It cannot be supposed that two stations of such size and magnitude would have been permitted to operate for a prolonged period unless they had been duly authorized and licensed by proper authority. These facts coupled with the presumption of legal compliance are alone sufficient to dispose of this contention of the plaintiff. But in addition the issue as to whether the stations were duly licensed at the time of the broadcast would appear to have been removed from the case by the pleadings. Both complaints allege that the corporate defendants hold licenses issued by the Federal Communications Commission to operate their respective stations. This allegation is admitted by the answer of WLAC, and is in effect admitted by the answer of WSM.

The Court cannot agree that these allegations refer alone to the time when the respective pleadings were filed in Court as argued by the plaintiff. On the contrary, the pleadings when construed in their entirety, would appear to refer to the period of time which would give them meaning and significance in the case, that is, to the period when the broadcast agreements were entered into and when the defamatory remarks were uttered and broadcasted. To the extent that the decision in **Weiss v. Los Angeles Broadcasting Co.**, 9 Cir., 163 F. 2d 313, can be construed to support the plaintiff's position in this respect, the Court is convinced that it is unsound and should not be followed.

Plaintiff further contends that Section 315 does not apply unless all candidates involved are legally qualified candidates according to state law and that there is no evidence to show either that defendant Sutton or Senator Kefauver was a legally qualified candidate. The applicable statute in Tennessee, TCA, Section 2-811, provides that the name of a candidate shall not be printed upon the official ballot used in a primary unless sixty days before such primary a nominating petition shall have been filed

with designated authorities. There is no direct evidence that all of the required steps were taken to qualify either candidate in the primary, but the fact that both candidates were legally qualified at the time of the broadcast otherwise clearly appears from the record. The defendant Sutton testified that his name was on the ballot and at another point in his testimony he stated the number of counties he had carried and the number of counties carried in the primary by Senator Kefauver. It thus appears that the names of both candidates were upon the ballots used in the primary. In such circumstances there is a strong legal presumption that public officials performed their duty in placing the candidates' names upon the official ballots pursuant to law and after compliance with all legal requirements. **Manis v. Farmers Bank**, 170 Tenn. 656. The broadcast involved in these cases occurred on July 12, 1954, and was contracted for on July 9, 1954, both of which dates were within sixty days prior to the primary election held on the first Thursday in August, 1954. There can be no question therefore that the defendant Sutton and Senator Kefauver were legally qualified candidates at the time the talkathon was broadcast.

Plaintiff's third contention is that Section 315 is applicable only when candidates seek "equal opportunities". The basis of the argument is that when a candidate requests and is granted more time than that first requested and allowed to another candidate, the "equal opportunities" provision of Section 315 has not been complied with. In such event it is argued that the station has made an election not to rely upon the immunity provided for by that section. The Court cannot agree that this is a correct interpretation of the section. Section 315 merely requires that the opportunity shall be equal, in effect providing that there shall be no discrimination against any candidate. Each candidate must be afforded or given the opportunity to have the same amount of time as any other

candidate if he so desires or requests it. The purposes of the statute would be seriously curtailed and frustrated if its application depended upon an exact division of time between the respective candidates in a political race.

Finally it is the plaintiff's position that Section 315 does not apply and that the radio or television station involved is not entitled to immunity unless it was compelled to enter into the broadcast agreement as a result of Section 315. The predicate of this argument is the use of the words "under the provisions of this section" in the censorship clause. Plaintiff argues that the proof shows in the case that the time allowed to defendant Sutton was not allowed under the provisions of Section 315 but was allowed for the selfish purposes of the defendant stations. It is further insisted that the testimony shows that the talkathon agreement was not entered into with Sutton as a result of Section 315 but because it was station policy to grant time to any candidate for public office. The argument proceeds on the false premise that Section 315 applies only when it is specifically invoked in some way either by a candidate requesting time or by the station involved. It is altogether clear as pointed out that the Federal Communications Act occupies and regulates the field of interstate radio and television communications. Equally clear is the proposition that Section 315 occupies the field of political broadcasts made by candidates for public office and that it was intended to apply and govern notwithstanding the wishes of the parties affected. The words "under the provisions of this section" in the censorship clause are merely words of description and reference and not of limitation. The statute applies proprio vigore.

An order will be submitted overruling the motion of the defendant Sutton and sustaining the motions of defendants WSM and WLAC.

William E. Miller,
United States District Judge.

OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS.

(Filed Feb. 19, 1960.)

No. 13,950.

UNITED STATES COURT OF APPEALS.

For the Sixth Circuit.

Edward Lamb,
Appellant,
v.
Pat Sutton and WSM, Inc.,
Appellees.
Edward Lamb,
Appellant,
v.
Pat Sutton and WLAC, Inc.,
Appellees.

Appeal from the United States District Court for the Middle District of Tennessee.

Decided February 19, 1960.

Before: Miller and Weick, Circuit Judges, and Thornton, District Judge.

Miller, Circuit Judge. Appellant brought separate actions in the District Court, naming as defendants in one action the appellees Pat Sutton and WSM, Inc., and naming as

defendants in the other action the appellees Pat Sutton and WLAC, Inc. WSM, Inc., operated a radio station and television station on a commercial basis in Nashville, Tennessee. WLAC, Inc., operated a radio station on a commercial basis in Nashville Tennessee.

Appellee Sutton was a candidate for the office of United States Senator from Tennessee, opposing Senator Estes Kefauver in the Democratic primary held August 4, 1954. The actions sought damages against the appellees for alleged untrue and slanderous statements which the appellee Sutton made about the appellant in support of his candidacy in a so-called "Talkathon" over the facilities of the radio and television stations referred to above, covering a period of twenty-six and one-half hours on July 12 and 13, 1954. The cases were heard together by a jury. The District Judge overruled motions of WSM, Inc., and WLAC, Inc., for directed verdicts and submitted the cases to the jury. The jury returned a verdict of $15,000.00 against appellees Sutton and WSM, Inc., and a verdict of $10,000.00 against appellees Sutton and WLAC, Inc.

Thereafter, the District Judge sustained motions of WSM, Inc., and WLAC, Inc., to set aside the verdicts and for judgment in accordance with their motions for directed verdicts, and dismissed the actions against these appellees. This appeal followed. Sutton took no appeal. The cases were consolidated for the purposes of appeal.

Appellee's motions for directed verdicts were based on the ground "that by reason of Section 315, the Federal Communications Act of 1934, it has a privilege or immunity from suit for defamation based upon material broadcast by a legally qualified candidate for public office who was granted time by the licensee after his opponent had been granted time." This contention was sustained by the District Judge.

At the time when these cases were tried and decided the Supreme Court had not decided the case of **Farmers Educational & Cooperative Union of America v. WDAY, Inc.** This case was subsequently decided on June 29, 1959, and is reported at 360 U. S. 525. The Supreme Court ruled in that case in a five to four decision that Section 315 of the Federal Communications Act of 1934 bars a broadcasting station from removing defamatory statements contained in speeches broadcast by legally qualified candidates for public office and that the section grants the station a federal immunity from liability for libelous statements so broadcast. That ruling was made subsequent to the taking of the appeals in the cases below. It is controlling at this time, and, unless there is some merit in other contentions made by the appellant, it requires an affirmance of the judgments.

With that main issue removed from the case, the appellant now relies upon several other contentions, which in our opinion are largely technical and have no merit. Chief among these is the contention that Section 315 grants the immunity only in the case of "a legally qualified candidate," and that although Sutton and Senator Kefauver were announced candidates for the Democratic nomination for United States Senator, it was not alleged in the answers, or proven by the evidence, that either of them was "a legally qualified candidate" for such office, which is a necessary requirement in order to be entitled to the immunity provided by the statute. **Weiss v. Los Angeles Broadcasting Co.**, 163 F. (2) 313, 315, C. A. 9th, cert. denied, 333 U. S. 876.

Although the Federal Statute was not referred to in the answers by name or number, we think the answers sufficiently raised the defense provided by Section 315 of the Act by stating in substance the facts on which the defendants relied and claiming thereby the immunity pro-

vided under "the laws of the United States." **Kansas City Western Ry. Co. v. McAdow**, 240 U. S. 51, 54; **Jones v. City of Arcadia**, 147 Fla. 571, 3 So. (2) 338, cert. denied, 314 U. S. 688, rehearing denied, 314 U. S. 715, 716; **Jones v. Chicago, B. & O. R. Co.**, 343 Mo. 1104, 125 S. W. (2) 5. In addition, the motions for directed verdicts specifically relied upon Section 315 of the Federal Communications Act of 1934 which, it was claimed, granted immunity from suit for defamation "based upon material broadcast by a **legally qualified candidate** for public office." (Emphasis added.) We think that the issue of whether Sutton and Senator Kefauver were legally qualified candidates for public office was clearly injected into the case and so treated by the Court. It is so treated on this appeal. **Rule 15 (b), Rules of Civil Procedure; Hasselbrink v. Speelman**, 246 F. (2) 34, 38-39, C. A. 6th; **Underwriters Salvage Co. v. Davis & Shaw Furniture Co.**, 198 F. (2) 450, 453, C. A. 10th.

The District Judge in a well reasoned opinion, which is reported at **Lamb v. Sutton**, 164 F. Supp. 928, discussed and answered other contentions of the appellant, including the alleged deficiency of proof on the part of the appellees. We agree with his rulings with respect thereto.

The judgments are affirmed.

A PORTION OF THE INSTRUCTIONS TO THE JURY.

"'In this case the respective radio stations say that they have a defense under Section 315 of the Federal Communications Act which provides in substance that where a station grants time to one candidate, legally qualified candidate, in an election that it is required to offer equal opportunities to the other candidate and which further provides in cases under Section 315 that the stations have no right of censorship over the speeches used by the re-

spective candidates. The radio stations say that that gives them a complete defense in this case, that they had no right of censorship, that they had to allow the time, and therefore that they are not liable for any defamation which might have been committed by their co-defendant.

But the Court instructs you that that statute is not applicable in the case as a defense. You will not treat or consider that statute as a defense in the case.

However, it is competent and proper for you to consider the evidence in the case bearing upon the belief and understanding of the officials of the respective stations as to their rights under Section 315 and their duties under Section 315 in determining the question of whether there was any actual malice involved in the case on their part. In other words, if their belief that they were bound by that section to grant this time and had no right of censorship was a bona fide belief and was reasonable and based upon reasonable grounds, then that should be taken into account in determining whether there was any actual malice involved."

Transcript, pp. 1494-1495.

CERTAIN PROVISIONS OF THE FORMER TENNESSEE STATUTE.

2227.1. **Governor, United States Senator and railroad public utilities commissioner; nomination of candidates; compliance necessary; exceptions.** . . . All party nominations of candidates for the offices hereinafter specified shall be made in party primary elections held for each political party, in the manner, at the time and under the requirements as herein provided. Unless this act is complied with, party nominations falling within its terms shall not be placed upon the official ballots provided for by the

laws of this state; but this provision shall not affect the candidacy of persons independent of party nominations.

This act shall apply to party nominations for candidates for offices elected by the electors of the entire state at the regular November election, to-wit: Governor, United States Senator and railroad and public utilities commissioner. Such candidates shall be selected in the manner set forth in Section 3 (§ 227.3) hereof.

This act shall not apply to nominations of candidates of a party which party did not at the general November election next preceding the primary election cast more than ten per cent of the entire vote of the state for such party's nominee for governor (1937, 2nd, ex. ses., ch. 2, Sec. 1).

. . . . . .

2227.18. **Nominating petitions.** . . . The name of no candidate shall be printed upon any official ballot used in any primary under this act unless, at least sixty days before such primary, a nominating petition shall be filed in his behalf with the authorities herein designated, signed by qualified voters of the party whose nomination he seeks to the number of twenty-five. Such nominating petitions shall be in substance as follows: "We the undersigned qualified voters of the county of ....., State of Tennessee, and members of the ..... party, hereby nominate ..... of ..... county as a candidate for the office of ....., to be voted in the primary election to be held by the said party on the .... day of ..... We request that his name be printed upon the official ballot to be used in such primary." Where only one candidate for any office for which a candidate is to be nominated under this act shall so qualify, he shall be declared the nominee for that office and his name shall be placed on the official ballot.

The nominating petition shall be filed with the respective chairmen or secretaries of the State Primary Election

Commissions for the particular party (1937, 2nd ex. ses., ch. 2, Sec. 18);

* * * * * * * *

2227.19. **Certification of names of candidates.**—It shall be the duty of the chairmen of the respective state primary election commissions to certify to the chairmen of the various county primary election commissions the names of all candidates in whose behalf proper nominating petitions have been filed not less than fifteen days before the date of the primary, and it shall be the duty of the county primary election commissioners to have printed upon the official primary ballots herein provided for the names of all candidates so certified to them (1937, 2nd ex. ses., ch. 2, Sec. 19) (Williams' Tennessee Code of 1934).

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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 943.

EDWARD LAMB,
Petitioner,
vs.
PAT SUTTON and WSM, INC.,
Respondents.

EDWARD LAMB,
Petitioner,
vs.
PAT SUTTON and WLAC, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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OPINIONS BELOW.

The Opinion of the United States District Court for the Middle District of Tennessee in this case has been reported at 164 F. Supp. 928. The Opinion of the United States Court of Appeals for the Sixth Circuit has been reported at 274 F. (2d) 705. Both Opinions are printed in the Appendix to the Petition and otherwise appear in the certified record.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

We do not agree that the questions presented for review by the Petition emerge from the record in this case, and we submit as the only question to be decided the following:

Shall the Supreme Court grant certiorari in order to review the concurrent findings of two courts below that the respondents, licensees under the Federal Communications Act of 1934, properly raised the defense of immunity under Section 315 of said Act, and established the necessary facts to support such defense?

STATEMENT OF THE CASE.

A comparison of the statement of the case by petitioner with the statement thereof by the courts below in their respective opinions will disclose that the case stated by petitioner is not the case stated and decided by the courts below. Because of the inaccuracies, omissions and irrelevancies in petitioner's statement of facts, we believe it is necessary to make a new statement as follows:

Petitioner sued Pat Sutton and WSM, Inc., for libel. His complaint averred that the defamations were uttered by Sutton, a member of Congress, at a time when he was an announced candidate for the Democratic nomination for the office of United States Senator and when his opponent in the Primary was Senator Estes Kefauver (App., 6a), and that the defamations were broadcast over the radio and television facilities of respondent WSM, Inc., by the use of time purchased by Sutton (App., 7a, 9a). A similar suit was brought by petitioner against Pat Sutton and respondent WLAC, Inc., which then owned and operated a radio station but not a television station (App., 12a-20a). Both respondents (WSM, Inc., and WLAC, Inc.) admitted in their answers that Pat Sutton was a candidate for the office of United States Senator when he made the utterances complained of and that his opponent was Senator Estes Kefauver (App., 22a, 26a). In their answers the respondents also raised the defense provided in Section 315 of the Federal Communications Act by stating in substance the facts on which they relied and claiming thereby the immunity provided under the Federal law (App., 22a-23a, 30a). The defense of Pat Sutton, the candidate who uttered the alleged defamations, was that they were true and he was justified in saying them (App., 36a).

At a pretrial conference, respondents again asserted the defense of immunity under Section 315 (App., 34a, 37a and

Tr. of Proceedings at Pretrial Conference made a part of the record by order of the Court of Appeals under date of February 10, 1960). At such conference the parties enumerated the issues of fact to be tried by the jury and the issues of law to be determined by the Court (App., 36a). No party suggested there was any issue of fact as to the qualifications of Pat Sutton and Estes Kefauver and there was no such issue of fact specified (App., 36a and Tr. of Proceedings at Pretrial Conference). Among the issues of law to be determined by the Court were these:

> "1. The meaning and applicability of Section 315, Title 47, U. S. C. A.
>
> 2. The constitutionality of Section 315, Title 47, U. S. C. A. in the event it were to be applied as contended by corporate defendants" (App., 37a).

The cases were tried jointly over the objection of petitioner, and subsequently were consolidated in order that one record could serve for both on appeal (App., 76a). In the opening statements to the jury, respondents stated and explained their defense of immunity under Section 315 (App., 94a-95a), and in advance of the hearing filed trial briefs with the Court with respect to the matter (App., 40a, 90a).

The issues of fact as to the truth of the defamatory statements and as to Sutton's justification for making them resulted in a protracted trial lasting three weeks, and with a record of more than 1500 pages (App., 39b, 40b). The evidence as to these matters is no longer relevant and need not be stated. The testimony established that Pat Sutton was a legally qualified candidate (App., 73a, 132-133a, 3b, 6b, 8b-11b, 16b, 33b-35b).

The testimony also established that Estes Kefauver, Sutton's opponent, was a legally qualified candidate (App., 7a, 22a, 73a, Ex. 1, 6b, 8b-11b, 16b, 33b-35b).

The evidence showed that Sutton in furtherance of his campaign for United States Senator conducted a so-called "Talkathon" which was carried over the radio and television facilities of respondents and that the defamatory statements complained of were made by him in the course of the Talkathon (App., 5a-6a, 15a-16a); that prior to this time Senator Kefauver had used the facilities of both respondents for political broadcasts in connection with his current campaign and had previously contracted for their use on a date subsequent to the Talkathon (App., 150a, 13b, 20b, 36b). There was no conflicting evidence with respect to any of the facts enumerated in this paragraph. No one ever questioned that Pat Sutton and Estes Kefauver were qualified candidates and everybody knew they qualified as candidates (App., 158a).

At the conclusion of all the evidence, both respondents made motions for directed verdicts, each on the ground that "by reason of Section 315 of the Federal Communications Act of 1934, it has a privilege or immunity from suit for defamation based upon material broadcast by a legally qualified candidate for public office who was granted time by the licensee after his opponent had been granted time" (App., 57a). The Court announced that without indicating an opinion on the merits of the motions they would be overruled and could be renewed if necessary after verdicts (App., 39b-40b). Following verdicts for the plaintiff against Pat Sutton and both respondents, the respondents moved the Court to set aside the verdicts and to enter a judgment in their favor in accordance with their motions for directed verdicts made at the conclusion of the evidence (App., 58a-59a). These motions were sustained (App., 84a, 86a) and a carefully prepared opinion was filed (App., 61a). Petitioner's appeal followed. The individual defendant Pat Sutton, against whom verdict and judgment were rendered, did not appeal.

ARGUMENT.

I.

There Is No Conflict of Decisions.

(a) In the present case the courts below held that where broadcasting stations sold time to Senator Kefauver, a legally qualified candidate, and thereafter sold time to Congressman Pat Sutton, his opponent, also a legally qualified candidate, such licensees are forbidden by Section 315 of the Federal Communications Act to remove defamatory statements from material broadcast by Sutton and are not liable for defamations uttered by him speaking as a candidate in his own behalf. In an effort to obtain certiorari from this Court to review this case, petitioner asserts that its holding is in conflict with the decision of the Ninth Circuit, in **Weiss v. Los Angeles Broadcasting Company, Inc.**, 163 F. (2d) 313.

There is no such conflict as petitioner claims. The present case is an action by a defamed person against broadcasting stations for statements which a legally qualified candidate made over the stations after previous use by his opponent, also a legally qualified candidate. The Weiss case was a suit by a legally qualified candidate against a broadcasting station for censoring his utterances when none of his opponents had used the facilities of the station. In the Weiss case an individual sued a licensee for breach of its alleged duty under Section 315. In the present case a licensee being sued for defamation relied upon its immunity under Section 315. In the Weiss case only the plaintiff, among opposing candidates, had ever used the broadcasting facilities of the licensee. In the present case both legally qualified candidates used the facilities of the licensee and it was the statements of the second user which were allegedly defamatory of a third party, the plaintiff. Thus

the two cases are entirely different and decisions in favor of both defendants (licensees) are not in conflict with each other.

In thus distinguishing the cases we do not indicate agreement with the Weiss case in its implication that a licensee has power to censor material broadcast by a legally qualified candidate so long as the licensee has sold no time to his opponent and that the no-censorship provision of Section 315 applies only when a licensee affords equal opportunity to one candidate to answer his opponent who has previously broadcast.

The language of the Act does not support such interpretation. It forbids censoring of "material broadcast under the provisions of this Section." All material broadcast by legally qualified candidates is broadcast under its provisions, as is demonstrated by the fact that Section 315 enumerates the charges which may be made therefor.

A broadcasting station is forbidden to bar libelous statements of legally qualified candidates, whether the uttering candidate was a second user or was the first candidate in that political contest to speak over that station, or even whether at the time of the utterance he was the only qualified candidate. The freedom of a candidate from censorship does not depend upon the status of his opponent. The candidate's right to demand time from a licensee depends upon whether time has been granted his opponent, but his freedom from censorship is not so limited. Such we understand to be the true meaning of Section 315 and the unanimous holding of this Court in both opinions in the case of **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, 360 U. S. 525, 79 S. Ct. 1302, 3 L. Ed. (2d) 1407.

The immunity in Section 315 is obviously no less broad than its restriction upon censorship. Where the station cannot censor a reply broadcast by a candidate, it is im-

mune from liability for defamation which he utters. Where the station cannot censor a broadcast by the first candidate to use its facilities, there is the same immunity. Thus respondents doubt that the Weiss case is right in its implication that the no-censorship provision applies only where an opposing candidate has used the facilities, and the District Judge expressed the same doubt. **Lamb v. Sutton**, 164 F. Supp. 928, at 935. However, even if the Weiss case is right as to when the no-censorship provision applies with its consequent immunity, then the case at bar factually meets its requirement because respondents had sold time to Senator Kefauver before they sold the time to Pat Sutton for the occasion on which he uttered the defamations.

Finally, if it be assumed that there is a conflict between the Weiss case and the case at bar, then there is the same conflict between the Weiss case, decided in 1947, and the case of **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, supra, decided by this Court in June, 1959. In such situation, the Weiss case has lost all vitality and been discredited in this connection and there would exist no conflict of decisions to justify the granting of certiorari. As further demonstration that there is no conflict, respondents point out that the Weiss case was not even cited in the opinions of this Court in **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, supra.

(b) In another effort to find a conflict of decisions as the basis for certiorari, petitioner asserts a conflict between the holding of the Sixth Circuit in this case and the decision of the Second Circuit in **Fernandez v. United Fruit Company**, 200 F. (2d) 414, wherein it was held that the District Court did not commit error in limiting the consideration of the issues at the trial to those issues enumerated by pretrial order.

The asserted conflict is imaginary and non-existent. Petitioner's claim of conflict is that in the Fernandez case the Second Circuit affirmed a District Court, which in the trial of the case had limited a party to the issues enumerated in the pretrial order, while in the case at bar (according to the claim) the Sixth Circuit affirmed the District Court, which in the trial of the case permitted a party to rely upon an issue not enumerated in the pretrial order. Even if petitioner's premises were true and the Sixth Circuit had done that which petitioner claims, there would still not be a conflict of the decisions. The fact that a trial court did not commit reversible error when it held a party to a pretrial order does not establish that another trial court in a different case and under other circumstances committed reversible error in permitting a departure from the pretrial order.

The real answer to petitioner's contention and the one given by the Sixth Circuit (the contention not having been made in the trial court) is more basic. **Petitioner's premises are false because respondents did not go beyond the pretrial order in any respect.**

At the pretrial conference respondents explained to the Trial Court their defense under Section 315 and said "that the law which forbids the station to censor by implication grants a privilege against liability for damages resulting from the liability of the candidate". It was further explained that the candidate remains liable for his own defamations but the station, which has no power to censor, cannot be held liable for damages and "that Congress exercised its power and occupied the field" (Proceedings at Pretrial Conference made part of the record by order of Court of Appeals under date of February 10, 1960). This defense, explained to the Trial Court at the pretrial conference, was the same defense which had been advanced in the answers (App., 21a, 25a; Appendix to Petition, 47-48).

In the pretrial conference, petitioner denied that respondents had correctly interpreted Section 315 or that the statute granted the claimed immunity. In view of these conflicting positions the Pretrial Order provided that among "the issues of law to be determined by the Court" were "the meaning and applicability of Section 315" and its constitutionality "in the event it were to be applied as contended" by respondents (App., 37a). The meaning, the applicability and the constitutionality of Section 315 could not be issues of law unless the necessary facts to bring the statute into operation were admitted or capable of being proved. It appeared to respondents at the pretrial conference that these facts were admitted because petitioner did not ask that they be enumerated as issues of fact after respondents had specifically given their interpretation of Section 315 and relied upon it.

There was very real reason for respondents' belief. The whole case from beginning to end was tried only upon the theory that Congressman Pat Sutton was a candidate against Senator Estes Kefauver, and, in furtherance of his candidacy, Sutton broadcast certain allegedly defamatory statements. Both complaints alleged that Pat Sutton was an announced candidate who uttered the defamatory statements during the campaign and that Senator Kefauver was his opponent. These allegations had been admitted by the answers and the immunity of Section 315 invoked. Everybody knew Kefauver and Sutton qualified as candidates, that both names appeared upon the ballot, that Kefauver won and Sutton lost, and no one ever questioned their qualifications (App., 158a).

Petitioner's contention is that under the Pretrial Order, as construed by petitioner, the respondents were prevented from proving that Kefauver and Sutton were legally qualified candidates and were thus prevented from having the trial court consider and sustain a motion for directed ver-

dict based upon Section 315. Both courts below refused to give the Pretrial Order such an amazing and unfair interpretation. For the trial court to have held it could not decide an issue of law reserved for its decision by the Pretrial Order because such order did not make the facts with respect to the matter an issue for the jury would have been far fetched indeed and would have entirely ignored specific provisions of such order.

Thus petitioner's argument that the holding in the case at bar conflicts with the holding in **Fernandez v. United Fruit Company**, supra, is based upon the erroneous premise that in the present case there was a pretrial order which waived or abandoned the defense that Section 315 granted immunity, which defense had been asserted in the answers and restated at the pretrial conference. In an effort to make this contention have some plausibility, petitioner carefully discusses it without bringing to the attention of this Court the only provisions of the Pretrial Order relevant to his contention, these being the portions which enumerated the issues of law to be determined by the Court, including the meaning and applicability of Section 315 and its constitutionality if construed as contended by respondents.

II.

There Is No Important or Undetermined Federal Question.

In **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, supra, this Court held that "Section 315 of the Federal Communications Act of 1934 bars broadcasting stations from removing defamatory statements contained in speeches broadcast by legally qualified candidates for public office" and "grants the station a Federal immunity from liability for libelous statements so broadcast". Such holding definitely and

authoritatively settled the only substantial Federal question in petitioner's case.

Petitioner in the present case does not raise any question as to the soundness of the holding in **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, supra, nor ask that such decision be overruled, departed from or qualified. These questions are, therefore, not presented for review. Rule 23 (c); **National Licorice Company v. National Labor Relations Board**, 309 U. S. 350, 60 S. Ct. 569, 84 L. Ed. 799; **Mazer v. Stein**, 347 U. S. 201, 74 S. Ct. 460, 98 L. Ed. 630.

In the present case, the Opinion of the District Court held that by Section 315 the respondents were denied the right to censor material broadcast by legally qualified candidates and by necessary implication were granted immunity from liability therefor (App., 61a, **Lamb v. Sutton**, 164 F. Supp. 928). This Court in **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, supra, recognized that such was the holding of the District Court in the case at bar and cited **Lamb v. Sutton** to that effect in Footnotes 3, 8 and 14 of the majority opinion.

When the case at bar was tried, decided and appeal taken, this Court had not decided **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, supra, nor even granted certiorari in that case. There was in prospect on the appeal of the case at bar the presentation of an important question of Federal law not previously answered by this Court, nor even by any United States Court of Appeals. Then came the decision of this Court in **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, supra, so that even prior to the argument of the present case in the Court of Appeals for the Sixth Circuit there had ceased to be present in the case any substantial or undetermined Federal question. The opinion of the Sixth Circuit recognized this to be the situation

[**Lamb v. Sutton**, 274 F. (2d) 705]. The only Federal question of substance had been resolved adverse to petitioner by the opinion of this Court on June 29, 1959 in **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, supra.

Whether respondents raised the question of their claimed immunity under Section 315 by pleadings which petitioner (but not the two lower courts) regards as inadequate is not an important Federal question. Whether Congressman Pat Sutton, a defeated candidate for United States Senator in 1954, was then a legally qualified candidate, and whether Senator Estes Kefauver, a successful candidate for United States Senator in 1954, was then a legally qualified candidate are not important Federal questions. Whether these facts were proven by clear, convincing and uncontradicted evidence, as the two lower courts held, is not an important Federal question. Yet these are the contentions to resolve which petitioner asks this Court to grant certiorari.

Whether the trial court, by directing a verdict for respondents, deprived petitioner of his constitutional right to trial by jury could be a substantial question under a different record. However, in this case the record shows: (1) petitioner, aware of respondents claim of immunity under Section 315, did not at the pretrial conference make the legal qualifications of either candidate an issue of fact triable by jury; (2) the fact of qualification by both candidates is clearly established in the record, as appears from the Statement of the Case, hereinabove, pp. 3-5; (3) in the petition no effort is made to point to any contradictory evidence, this for the reason that there is not a scintilla or even suspicion of such evidence; and (5) petitioner's contention in this respect is an afterthought, advanced for the first time in this Court, as appears from the opinions below.

Petitioner proceeds upon the erroneous assumption that this Court grants certiorari to review evidence and discuss

specific facts, but the practice is otherwise. **United States v. Johnston**, 268 U. S. 220, 227, 45 S. Ct. 496, 69 L. Ed. 925. Petitioner proceeds upon the further erroneous assumption that this Court sits for the benefit of particular litigants, but this Court has held to the contrary. **Rice v. Sioux City Memorial Park Cemetery**, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897.

III.

There Is a Concurrence of Findings.

Petitioner asks this Court to grant certiorari in order to search the record and conclude that there is no evidence Congressman Pat Sutton was a legally qualified candidate for United States Senator in 1954 and also that there is no evidence Senator Estes Kefauver was a legally qualified candidate in 1954, when he was renominated and reelected. Respondents will not discuss the evidence in this regard, because in the next and final section of this Argument, it will be shown that the decision is clearly correct, and, *a fortiori*, there was evidence to support it. In this respect there are concurrent findings of the two courts below:

The District Court held that it clearly appeared from the record both candidates were legally qualified at the time of the broadcast (App., 61a, 73a; **Lamb v. Sutton**, 164 F. Supp. 928, at 935). This finding is to be contrasted with the erroneous assertion of the petition, page 19, based upon a selected excerpt from a colloquy during argument that "the district court was completely convinced" neither candidate was legally qualified.

The Court of Appeals held:

> "The District Judge in a well-reasoned opinion . . . discussed and answered other contentions of the appellant, including the alleged deficiency of proof on the part of the appellees. We agree with his rulings

with respect thereto" [Appendix to Petition, p. 48; **Lamb v. Sutton**, 274 F. (2d) 705 at 707].

This Court has held that granting the writ of certiorari is not warranted merely to review the evidence or inferences drawn from it. **General Talking P. Corp. v. Western Electric Co.**, 304 U. S. 175, 178, 58 S. Ct. 849, 82 L. Ed. 1273; **Southern Power Co. v. North Carolina Pub. Serv. Co.**, 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413. The Court has many times emphasized the weight to be given concurrent findings of two lower courts, holding that they are not to be disturbed unless clear error is shown. **Faulkner v. Gibbs**, 338 U. S. 267, 70 S. Ct. 25, 94 L. Ed. 62; **Anderson v. Abbott**, 321 U. S. 349, 356, 64 S. Ct. 531, 88 L. Ed. 793. In other cases the Court has said that findings which are concurrent findings of two lower courts will be accepted by it without re-examination of the evidence. **Allen v. Trust Co. of Georgia**, 326 U. S. 630, 636, 66 S. Ct. 389, 90 L. Ed. 367; **United States v. O'Donnell**, 303 U. S. 501, 508, 58 S. Ct. 708, 82 L. Ed. 980.

IV.

The Decision Is Clearly Correct.

Pat Sutton, a legally qualified candidate for United States Senator, purchased the use of the broadcasting facilities of respondents in furtherance of his candidacy. Prior to the time of the purchase such facilities had been used by his opponent, Senator Estes Kefauver, and the latter had also contracted for their use on a date subsequent to the broadcast-telecast by candidate Sutton. Petitioner sued respondents and Sutton for defamatory statements made by Sutton in furtherance of his candidacy and broadcast over respondents' facilities.

The defense of respondents was that by Section 315 of the Federal Communications Act they were denied the power to censor the statements of candidate Sutton and

were granted immunity against liability for such utterances. This defense was asserted in the answers, reiterated at the pretrial conference, discussed in pretrial briefs, outlined in the opening statement at the trial, relied upon in motions for directed verdicts and again relied upon in motions to set aside verdicts. Such defense was sustained by the trial court. Subsequent to the decision of this Court in **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, supra, the decision in the present case was affirmed by the Sixth Circuit.

The facts stated were established by evidence, as the two courts below have concurred in finding. Thus the decision below is clearly correct unless the decision of this Court in **Farmers Educational and Cooperative Union v. WDAY, Inc.**, supra, is erroneous, but the petition for certiorari does not question the soundness of such holding nor ask that it be overruled or qualified. We, therefore, submit the petition should be denied because the decision below is clearly correct.

Respectfully submitted,

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